



**Via Email**

April 15, 2022

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**Re: Supplemental NEPA Analysis and Consultation Required for the Rosemont Clean Water Act Section 404 Permit SPL-2008-0816-MB**

Dear Mr. Castanon and Ms. Balten:

The Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, the Tribes) urge the U.S. Army Corps of Engineers (Corps) to prepare a supplemental environmental impact statement (SEIS) for the Rosemont Clean Water Act Section 404 Permit SPL-2008-0816-MB. An SEIS is required because the Rosemont Copper Company (Rosemont) significantly expanded the proposed project to include the 3,430-acre Rosemont Copper World Expansion. The Corps must comprehensively analyze the vastly expanded Rosemont Mine, including the Copper World Expansion, to inform its decision about whether to reinstate, modify, or revoke Rosemont's Section 404 Permit.

The Tribes also request formal, government-to-government consultation to evaluate the adverse impacts of the Copper World Expansion on culturally significant sites. The Copper World Expansion would destroy an ancestral Hohokam village site and forever alter the Santa Rita Mountains—a traditional cultural property of deep significance to the Tribes. The Corps must engage in consultation so that it can ensure that its decision regarding the Section 404 Permit avoids and minimizes any adverse impacts to these historic properties.

To be clear, the Corps had an obligation to prepare an SEIS and consult with the Tribes *before* Rosemont started ground-clearing activities. It failed to do so: Rosemont abruptly started grading and clearing the Copper World Site in early April, resulting in unpermitted discharges into the same potentially jurisdictional waters covered by the Section 404 Permit.<sup>1</sup> Even though

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<sup>1</sup> Letter from Stuart Gillespie, Sr. Att'y, Earthjustice, and Caitlin Miller, Assoc. Att'y, Earthjustice to Javier del Rio, Vice President, Rosemont Copper Company, Re: 60-Day Notice of Intent to Bring Citizen Suit for Rosemont Copper Company's Violations of the Clean Water Act

the Tribes warned Rosemont against the unlawful destruction of these waters of the United States, the company has pressed forward, amassing more heavy machinery to grade the site on April 14, 2022, as depicted in the photos below.



Figure 1: A bulldozer grading a braided ephemeral stream on the Copper World Expansion

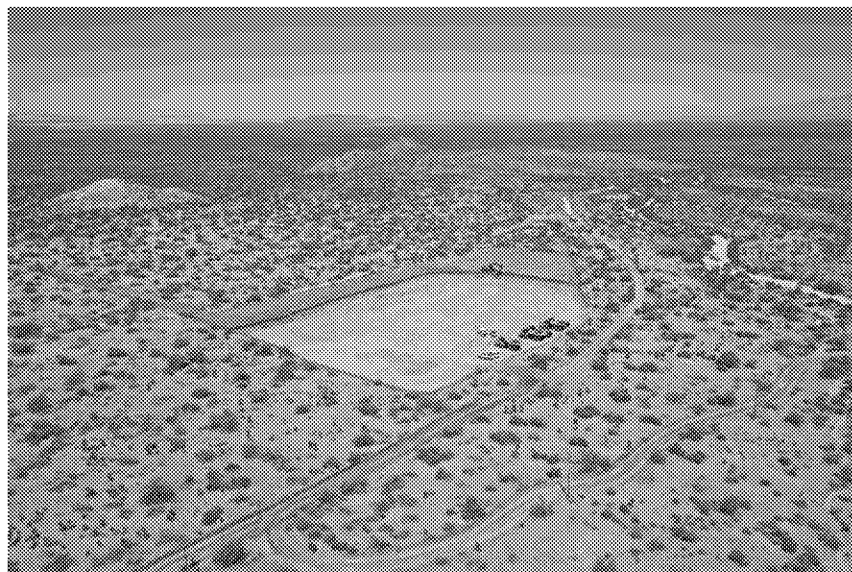


Figure 2: Heavy machinery staging and clearing the Copper World Expansion

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at the Copper World Expansion Site (April 4, 2022); Letter from Stuart Gillespie, Sr. Att’y, Earthjustice, and Caitlin Miller, Assoc. Att’y, Earthjustice to Javier del Rio, Vice President, Rosemont Copper Company, Re: Amended 60-Day Notice of Intent to Bring Citizen Suit for Rosemont Copper Company’s Violations of the Clean Water Act at the Copper World Expansion Site (April 12, 2022).

Rosemont has refused to halt these activities, informing the Pima County Flood Control District that it intends to clear the entire site, including all of the waters of the United States and cultural resources.<sup>2</sup>

Despite these actual, imminent, and irreversible harms, the Corps has not complied with its legal obligations under the National Environmental Policy Act (NEPA) or National Historic Preservation Act (NHPA). It has not initiated the process of preparing a comprehensive SEIS; it has not consulted with the Tribes to protect cultural resources; it has not directed Rosemont to halt construction activities. The Corps' inaction—in the face of Rosemont's destruction of our nations' waters, the Tribes' cultural heritage, and the environment—violates NEPA and the NHPA.

The Corps must remedy its unlawful conduct by immediately directing Rosemont to cease any ground-disturbing activities on the Copper World Expansion site so that the Corps can comply with NEPA and NHPA. That is the only way the Corps can make an informed decision about whether to reinstate, modify or revoke the Section 404 permit, *before* the damage is done. Given the exigencies of the circumstances, we request the Corps' prompt response to this request by close of business on Monday April 18, 2022.

**I. The Corps Must Prepare a Supplemental Environmental Impact Statement To Analyze the Copper World Expansion.**

NEPA “establishes action-forcing procedures that require agencies to take a hard look at environmental consequences.” *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000). To comply with NEPA, agencies must remain alert to changed circumstances or new information that may alter the results of their original analysis. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). Agencies must prepare a supplemental environmental impact statement whenever there are (1) substantial changes in the proposed action that are relevant to environmental concerns; or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1). The Rosemont Copper World Expansion satisfies both of those criteria, triggering the Corps' mandatory obligation to prepare an SEIS.

First, the Copper World Expansion represents a substantial—indeed massive—change to the Rosemont Mine project. When Rosemont obtained the Section 404 Permit for the Rosemont mine, the proposed project involved the temporary filling of potentially jurisdictional waters on

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<sup>2</sup> See Letter from Javier del Rio, Vice President, Rosemont Copper Company, to Eric Shepp, Pima County Regional Flood Control District (April 12, 2022); *see also* Letter from Javier del Rio, Vice President, Rosemont Copper Company, to Eric Shepp, Pima County Regional Flood Control District (April 1, 2022).

the west side for the Utility Corridor.<sup>3</sup> The Corps and Rosemont agreed that the network of ephemeral streams were waters of the United States protected under the Clean Water Act.<sup>4</sup> The picture below depicts the Utility Corridor in black, with red marks showing where it crosses the blue network of ephemeral waters of the United States.

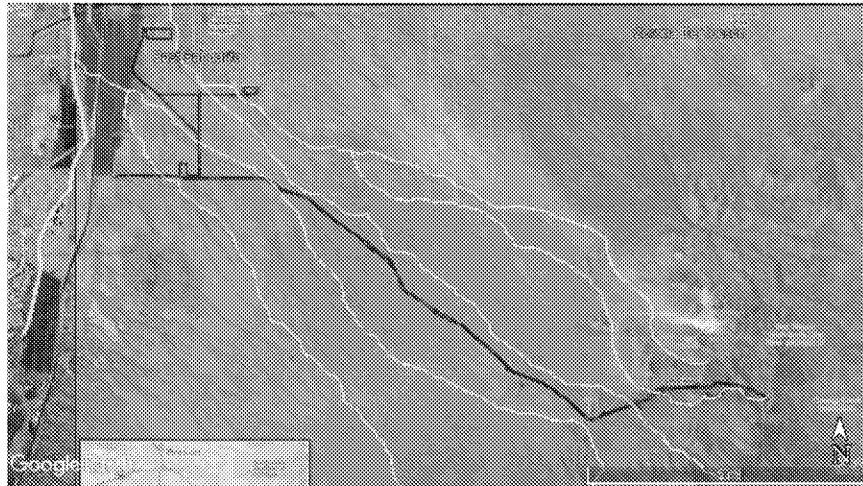


Figure 3: Map depicting Potentially Jurisdictional Streams (Blue) crossing Utility Corridor (Black)

Rosemont has since significantly expanded the proposed project to include the 3,430-acre Copper World Expansion on the west side.<sup>5</sup> As part of that expansion, Rosemont proposes to grade, fill, and permanently destroy the very same ephemeral streams in the Utility Corridor that are protected under the Section 404 Permit. Rosemont would then construct a massive waste rock pile, heap leach pad, and processing facility in that corridor, as depicted in the zoomed in map below which shows the same ephemeral streams in blue.

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<sup>3</sup> S. Pac. Div., U.S. Army Corps of Eng'rs, Department of the Army Permit: SPL-2008-00816-MB (2019).

<sup>4</sup> See WestLand Resources, Inc., Preliminary Jurisdictional Determination: Santa Rita Road Waterline for the Rosemont Project, Pima County, Arizona (March 1, 2010); Record of Decision for the Rosemont Copper Project SPL-2008-00816-MB (Mar. 8, 2019) at 6 (identifying the waters of the United States on the Rosemont site and Utility Corridor).

<sup>5</sup> See Letter from Javier Del Rio, Vice President, Hudbay Minerals, Inc., to Pima County Regional Flood Control District (March 10, 2022).

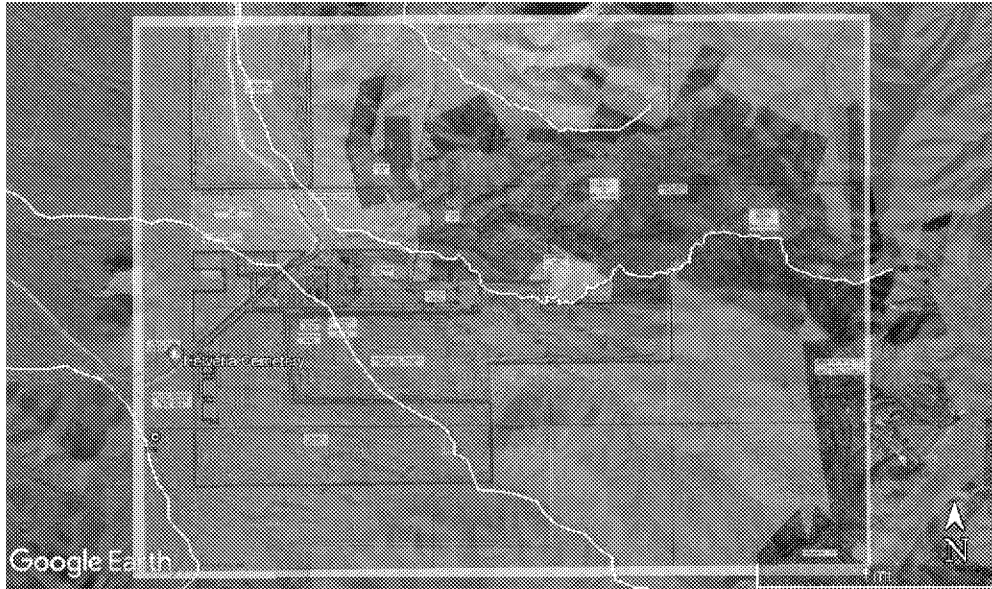


Figure 4: Map depicting where Copper World Expansion overlaps the same network of ephemeral streams (blue) in the Utility Corridor

The Copper World Expansion would also involve the construction of multiple tailings facilities and six open pits to the north and east of the utility corridor, vastly expanding the footprint and destroying many more miles of the same ephemeral tributaries protected by the Section 404 Permit. These substantial changes to the proposed project demand an SEIS.

Second, the Corps must prepare an SEIS given the significant new information documenting the far-reaching impacts of the Copper World Expansion. The expanded project would irreparably destroy the ephemeral streams running across the site, as just noted. It would also destroy a tribal ancestral habitation site in the Utility Corridor, clearing it off the land to make way for a waste rock facility and heap leach pad.<sup>6</sup> In addition, the Copper World Expansion would transform the west side of the Santa Rita Mountains into an industrial mining complex, degrading this traditional cultural landscape that contains sacred sites, such as Huerfano Butte.<sup>7</sup> Furthermore, the expanded project would adversely impact critical habitat for the jaguar on the west side, exacerbating the harms from the Rosemont Mine already identified by the Court. *See Ctr. for Biological Diversity v. United States Fish & Wildlife Serv.*, 441 F. Supp. 3d 843, 856 (D. Ariz. 2020) (“The record reflects that the Rosemont Mine may likely result in the destruction or adverse modification of Unit 3 and Subunit 4b of the jaguar critical

<sup>6</sup> See SWCA Env'tl. Consultants, Historic Properties Treatment Plan for Rosemont Copper Utilities, Pima County, Arizona at 80 (2014) (identifying a Hohokam habitation site, EE 1:446, in the Utility Corridor that contains a number of archeological features, such as domestic rooms, and was determined to be on the scale of a small village).

<sup>7</sup> Suzanne Grisct, SWCA Env'tl. Consultants, William Gillespie, Coronado Nat'l Forest, and Mary Farrell, Trans-Sierran Archaeological Research, National Register of Historic Places Registration Form for Ce:Wi Duag (“Long Mountain” in O’odham) at 3–15 (2012).

habitat.”). These impacts easily clear the “low standard” requiring an SEIS. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

The Corps has an obligation to analyze these impacts given its control and responsibility over the Copper World Expansion site. As depicted below, the network of jurisdictional streams identified in the Section 404 permit and preliminary jurisdictional determination weave across the utility corridor and Copper World Expansion site as they descend down to the Santa Cruz River.

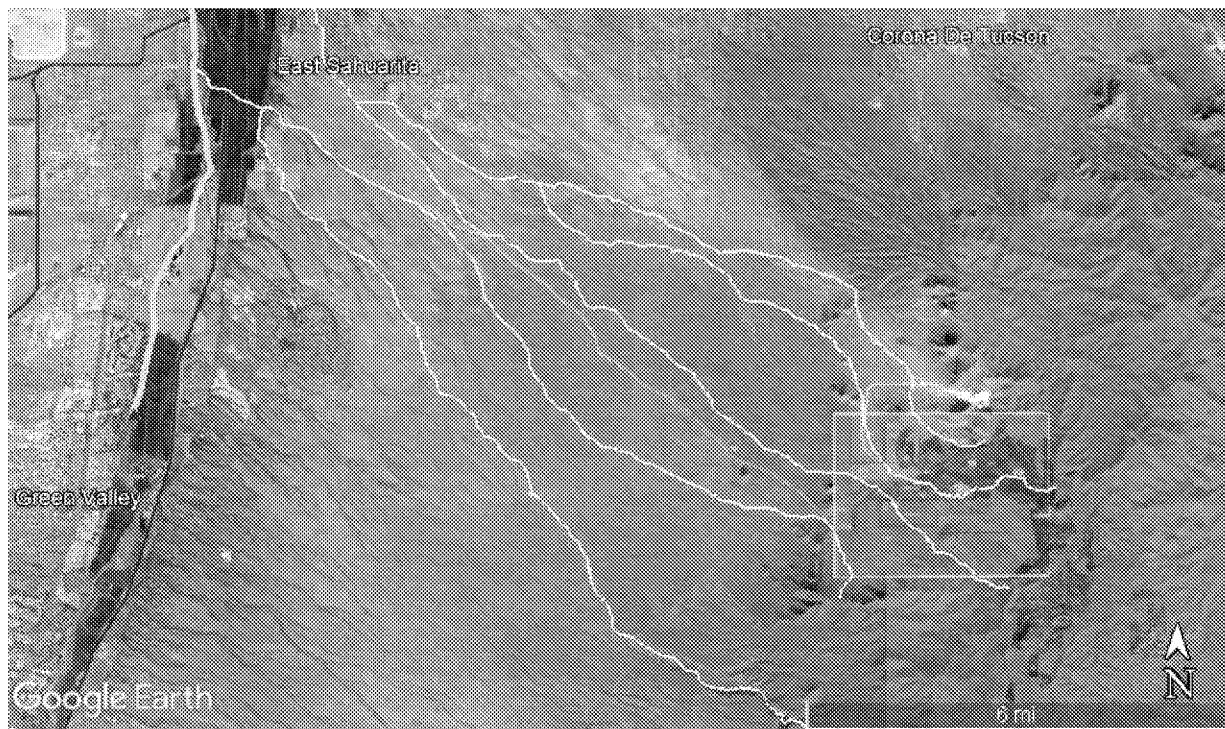


Figure 5: Map depicting ephemeral tributaries crossing utility corridor and Copper World Expansion

Rosemont cannot construct the Copper World Expansion without filing these streams, which are inseparable from the landscape. The Corps must therefore analyze the impacts of the Copper World Expansion, which fall squarely within its control and responsibility. *See White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040-42 (9th Cir. 2009); *Save Our Sonoran, Inc. v. Flowers (SOS)*, 408 F.3d 1113, 1124 (9th Cir. 2005).

Yet, the Corps has not analyzed the significant impacts of the Copper World Expansion. The Environmental Impact Statement claimed the Copper World Expansion was too speculative to analyze in 2014 and so made no effort to do so.<sup>8</sup> Whether or not that was true then, the facts

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<sup>8</sup> U.S. Forest Serv., Final Envtl. Impact Statement for the Rosemont Copper Project, Vol. 2 at 140 (Dec. 2013) (claiming that “future mining by Rosemont Copper of other mineral deposits in

are clear now in 2022: Rosemont has not only revealed its plans for the Rosemont Copper World Expansion, but commended grading, clearing, and earthwork. The Corps had an obligation to analyze the significant adverse impacts of those activities *before* they occurred. It failed to do so, violating NEPA.

## **II. The Corps Must Prepare a Comprehensive Analysis for the Rosemont Mine, Including the Copper World Expansion.**

The Rosemont Mine and Copper World Expansion are “connected” or “cumulative actions” that must be analyzed in a Supplemental EIS. 40 C.F.R. § 1508.25(a)(1). Yet, the Corps has failed to do so, violating NEPA.

### **A. The Rosemont Mine and Copper World Expansion Are Connected Actions That Must Be Analyzed in a Supplemental EIS.**

NEPA requires agencies to comprehensively analyze a proposed action and all “connected actions”—that is, all actions that are “closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(1). The Ninth Circuit has applied an “independent utility” test to determine whether multiple actions are connected so as to require consideration in a single EIS. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). “The crux of the test is whether each of two projects would have taken place *with or without the other* and thus had independent utility.” *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1226 (9th Cir.2015) (emphasis in original) (quotation marks omitted). Here, the Rosemont Mine and Copper World Expansion are connected—indeed inextricably intertwined—actions that must be analyzed in an SEIS.

As an initial matter, the Copper World Expansion cannot proceed absent the Section 404 permit for the Rosemont mine, demonstrating that the two lack independent utility. Rosemont must clear and grade the very same ephemeral streams covered by the Section 404 Permit to construct the waste rock pile, leach heap pad, and processing facility for the Copper World Expansion. In addition, the Copper World Expansion depends on the very same utility corridor for the Rosemont mine—that is, the utility corridor covered by the 404 permit.<sup>9</sup> In fact, there is no evidence Copper World is even economically viable absent the larger Rosemont project. Because the Copper World Expansion “[c]annot or will not proceed unless other actions are taken previously or simultaneously” under the section 404 permit, it must be analyzed in a comprehensive SEIS. 40 C.F.R. § 1508.25(a)(1)(ii).

Furthermore, the Rosemont Mine and Copper World Expansion “are interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* § 1508.25(a)(1)(iii).

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the area, specifically including the Peach-Elgin, Copper World, and Broadtop deposits” was “considered to be speculative.”).

<sup>9</sup> See Rosemont Copper World Reclamation Plan (Aug. 2021), Fig. 2: utility corridor.

As noted, the Copper World Expansion would destroy the same jurisdictional waters covered by the Section 404 Permit. Furthermore, the mining operations depend on the same utility corridor, without which Rosemont cannot operate its mine. On top of that, Rosemont has described the Copper World Expansion as part of the larger Rosemont Mine. The company plans to “consolidate mineralization” in the Santa Rita Mountains across all the deposits along the Santa Rita Mountain—that is, the Rosemont deposit and Copper World expansion deposits.<sup>10</sup> The company has identified “synergies” across the mining project, including the fact that the Copper World Expansion deposits overlaps with portions of the Rosemont Mine project.<sup>11</sup> The company is also analyzing “the development of the Copper World deposit in conjunction with the Rosemont deposit,” demonstrating they are all part of the larger Rosemont project.<sup>12</sup> Copper World is thus functionally, economically, and physically an interdependent part of the larger Rosemont mine. The Corps must therefore prepare an SEIS to consider the significant adverse impacts of the expanded mining project. Its failure to do so violates NEPA.

**B. The Rosemont Mine and Copper World Expansion are Cumulative Actions that Must be Analyzed in a Single EIS.**

NEPA requires agencies to analyze “cumulative actions”—those actions “which when viewed with other proposed actions have cumulatively significant impacts”—in a single NEPA document. 40 C.F.R. §1508.25(a)(2). Cumulatively significant impacts “cannot be avoided by . . . breaking [an action] down into small component parts” or foregoing that analysis entirely. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (quoting 40 C.F.R. §1508.27(b)(7)).

Here, the Rosemont Mine and Copper World Expansion will have a cumulatively significant impact on the environment and cultural resources, necessitating a comprehensive supplemental EIS. The Copper World Expansion overlaps and extends beyond the Utility Corridor, resulting in cumulatively significant impacts on the same ephemeral streams identified in the Section 404 Permit. Furthermore, the Copper World Expansion will degrade additional cultural resources, including a Hohokam habitation site and the Santa Rita Mountains traditional cultural landscape. The Copper World Expansion will also exacerbate harms to critical jaguar habitat caused by the Rosemont Mine. “A single EIS, therefore, was required to address the cumulative effects of the[] proposed [development].” *Blue Mountains Biodiversity*, 161 F.3d at 1215 (requiring a single EIS for multiple timber sales that could cumulatively impact the “same watershed”).

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<sup>10</sup> Hudbay Announces Significant New Discoveries at its Copper World Properties Adjacent to Rosemont, Press Release (March 29, 2021), available at [here](#).

<sup>11</sup> Hudbay Announces Initial Mineral Resource Estimate at Copper World (Dec. 15, 2021), available [here](#).

<sup>12</sup> *Id.*



At the very least, the Corps must consider the impacts of the Copper World Expansion as part of a cumulative impacts analysis for the Section 404 Permit. *See* 40 C.F.R. §1508.25(c). These impacts are significant, especially when added to the already significant impacts of the Rosemont mine and utility corridor. Yet, the Corps has failed to undertake *any* analysis of the Copper World Expansion before Rosemont started ground-breaking activities. That wholesale failure violates NEPA. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-96 n.2 (9th Cir. 2002) (agency violated NEPA by failing to analyze cumulative impacts of reasonably foreseeable future actions).

### **III. The Corps Must Consult With the Tribes Due to the Adverse Impacts of the Copper World Expansion on Culturally Significant Sites.**

The “fundamental purpose of the NHPA is to ensure the preservation of historical resources.” *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 609 (9th Cir. 2010). To that end, federal agencies must consult with Indian tribes on projects that could affect sites that are on, or could be eligible for, listing in the National Register of Historic Places, including sites that are culturally significant. 54 U.S.C. §§ 302706(a)–(b), 306108. The agency must ensure that the consultation process provides the tribe with a “reasonable opportunity to identify its concerns about historic properties . . . including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii)(A). In addition, the agency must consult with tribes to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.6(a).

The Corps, however, has failed to consult with the Tribes regarding the adverse impacts of the Copper World Expansion on historical properties, including culturally significant properties. The Copper World Expansion Would destroy an ancestral Hohokam village site by grading it off the land and then burring the site under millions of tons of waste rock. The Copper World Expansion would also transform the west side of the Santa Rita Mountains into an industrial mine site, degrading an important religious site (Huerfano Butte) and the Santa Rita Mountains—a traditional cultural property eligible for listing on the National Register of Historic Places.

Even though Hudbay has commenced construction activities, the Corps still has not consulted with the Tribes to identify ways avoid, minimize, or mitigate these adverse effects. The Corps’ inaction—in the face of the destruction of traditional cultural properties—violates the NHPA.

### **IV. The Corps Must Order Rosemont to Cease Any Construction Activities Pending NEPA Compliance and NHPA Consultation**

The Ninth Circuit has repeatedly affirmed the Corps' control and responsibility over development projects whose "viability is founded on the Corps' issuance of a Section 404 permit." *White Tanks*, 563 F.3d at 1042; *SOS*, 408 F.3d at 1123. The Court has thus enjoined any construction activities on such sites until the Corps complies with the law and issues a valid Section 404 Permit. *White Tanks*, 563 F.3d at 1042 (holding that an injunction is appropriate "[b]ecause no development could occur without impacting jurisdictional waters."); *SOS*, 408 F.3d at 1124 ("[B]ecause the uplands are inseparable from the washes, the district court was correct to conclude that the Corps' permitting authority, and likewise the court's authority to enjoin development, extended to the entire project.").

Here, the Corps has the authority to prohibit any activities on the Copper World Expansion site until it complies with NEPA and the NHPA. The site contains a network of ephemeral tributaries that the Corps identified as waters of the United States in the Section 404 Permit. The Copper World Expansion cannot construct its waste rock, tailings facility, or processing plans without filling these very same jurisdictional waters in the Utility Corridor. Furthermore, those very same streams weave across the entire Copper World Expansion, preventing Rosemont from developing the project without filling these waters. "Because no development can occur without impacting jurisdictional waters," the Corps' permitting authority thus extends across the entire site. *SOS*, 408 F.3d at 1124.

The Corps must exercise that authority and order Rosemont to halt any construction activities until the Corps has decided whether to reinstate, modify, or revoke the Section 404 Permit. The whole purpose of NEPA and the NHPA is to analyze impacts *before* they occur. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."). Allowing Rosemont to continue its ground-breaking activities would frustrate NEPA's core purpose that agencies look before they leap. Indeed, Rosemont plans to grade the entire site, erasing all of the ephemeral streams and cultural resources in an effort to strip the Corps of any decision-making opportunity. The Ninth Circuit has expressly rejected such tactics to "ignore the requirements of NEPA, build [] structures before a case gets to court, and then hide behind the mootness doctrine." *See Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). To prevent that unacceptable outcome, the Corps must swiftly exercise its authority to prevent any construction activities on the Copper World Expansion site pending compliance with NEPA and the NHPA. That is the only way to maintain the status quo and prevent irreparable harm until the Corps decides whether to reinstate, modify, or revoke the Section 404 permit.

Given the exigencies of the circumstances and Rosemont's accelerated construction activities, we respectfully request your prompt response to this letter.

Sincerely,

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